

**BOARD OF APPEALS
REGULAR MEETING MINUTES
SEPTEMBER 29, 2010**

Members Present: Clayton M. Harrison, Chairman
Gerald Coutinho, Vice Chairman
Christopher J. Graham
Kimberley Fernandes, Clerk
Donna Lambert, Alternate

Absent: William Wyatt, Alternate
Kendal Tripp

Also present: Ralph Souza, Building Inspector

Chairman Harrison called the Zoning Board of Appeals meeting to order at 7:00 PM in the Westport Town Hall, 816 Main Road, Westport, MA 02790.

Excel Recycling, LLC – RE: A remand Public Hearing will be held, pursuant to an order of remand issued by the Bristol Superior Court in litigation known as Price, et al. V. Excel and Harrison, et al, Bristol Superior Court C.A. No. BRCV2009-01602, regarding the application of Excel Recycling, LLC, 37 Charlotte White Road, Westport, MA for an Administrative Finding that the current use of 37 Charlotte White Road is not an alteration/expansion of a non-conforming use; or, if an alteration/expansion is found to exist, that the alteration/expansion is not substantially more detrimental than the prior, lawfully pre-existing, nonconforming use, under the Westport Zoning Bylaws Article 4.1.2 and 4.1.3. The property is depicted as Assessor's Map-67, Lot-10. The application and supporting materials are available for inspection at Town Hall in the Zoning Office during regular Town Hall hours.

Sitting on petition: Harrison, Coutinho, Graham, Fernandes, Lambert

Attending: Attorney Ilana Quirk, Kopelman & Paige, representing the Town of Westport
Attorney John Markey, representing Excel Recycling
Attorney Robert Feingold, representing Mr. & Mrs. Price

Abutters: Ronald & Loretta Price, 323 Main Road
Normand Methot, 361 Main Road
Julia Ferguson, 363 Main Road
Nathaniel Bryant, 363 Main Road
Carole Mann, 1 Kelsey's Way
Colleen Leonardo, 319 Main Road
Sarah & Ed Vieira, 7 Kelsey's Way

Chairman Harrison read the Public Hearing Notice aloud. Mr. Harrison stated the Board makeup has changed since the original hearing, by one member. Mr. Graham will be sitting on this hearing due to Kendal Tripp's absence. Mr. Graham has reviewed all the material, minutes, tapes and decision and has filed an affidavit to that effect. At this time,

both attorney's representing Excel Recycling and the Price's have signed off on the affidavit.

Attorney Quirk stated that back in 2009, the Zoning Board of Appeals made a determination and imposed conditions on a Special Permit granted to Excel Recycling. The matter was appealed to Superior Court. The court ruled that the Zoning Board of Appeals had no authority to impose conditions. The question now is with or without conditions in place, is this business substantially more detrimental.

Attorney Feingold, representing Mr. & Mrs. Price stated the decision was to remand back fully and not to limit to what was in existence back in October. The decision has to be made as to whether Excel is a legal operation.

Attorney Markey stated the remand hearing was to address issues that still remain. Attorney Markey believes that both Attorney Quirk and Feingold are in agreement, they are just representing it differently. The questions that will need to be looked at are whether a change in use has occurred and whether that change is substantially more detrimental. The focus tonight is whether or not, with or without conditions, this business is more detrimental. Attorney Markey stated that in focusing on what Thad's did for over 30 years at the property until 2005/2006, he processed vehicles with a crusher; there was a yard full of vehicles; auto parts were retailed out and other metals were brought into the active yard until early 2006. The Price's came along in 2005/2006 during the transition period of Thad's to Excel. The question is what existed when Mr. Moniz ran Thad's as to what Excel is doing now. In an affidavit provided by Mr. Costa regarding the conditions, Excel operated for two years as a renter. The issues only began to arise when Mr. Costa came forward to renew licenses under his name. At the prior hearings, there were discussions of the prior hours, equipment upgrade and improvements on the property for noise. There was a site visit by the Board members; some of the Board members noticed it to be quieter beyond the berm on the property. There was an issue with traffic flow and there was an effort made to eliminate trucks from lining up on Charlotte White Road by placing signs in front of the property saying "No Stopping" and signs allowing for the right of way for vehicles to enter the property. Attorney Markey stated his client has taken many steps to correct any problems. Attorney Markey said it was now up to the Board to look at numbers 1 to 4 of the Finding of Facts (hours, noise, traffic) and in doing so the Board will find the operation is not substantially more detrimental. Attorney Markey stated his client understands this is not a blank check and it should not be; another Finding of Fact could be added that includes "any expansion could be subject to scrutiny". Attorney Markey said that his client has made every effort to comply with the conditions and if there ever were anything to come up in the future, all that would be needed is a warning.

Attorney Feingold stated that in addition to representing the Price's, he is also speaking for the abutters as well. Attorney Feingold asked the Board's permission to allow his clients and the abutters to speak first and he would continue after them. The Board had no problem with this request.

Loretta Price stated she could only speak to the fact that when she moved there, it was quiet, no noise from any ongoing operation. Mrs. Price stated that when she and her husband moved there, Thad's was not in operation. As for the present, the noise is excessive and she can see the machinery operating even through the trees, which now

have foliage. Mrs. Price stated that Excel has destroyed her property value and destroyed the quiet life.

Julia Ferguson stated she was a customer of Thad's. Mr. Moniz had a low-key operation and that is why she bought her property without a problem. Since Excel has moved in, there is no peace and quiet to be had and the property value has dropped. Ms. Ferguson stated that she would never have bought the property in November 2005 if Excel had been in operation.

Nathaniel Bryant stated the tractor-trailer truck activity is still ongoing. The noise destroys any quality of life. There is no berm in our backyard. In the spring, a sheen of oil was coming off of Excel's property into Mr. Bryant's property. Mr. Bryant collected this material in a glass jar to present to the Board this evening. Mr. Bryant stated the material smelled like diesel. Mr. Bryant stated he has his water tested every year to make sure of no contaminants. Mr. Bryant stated he must monitor his property for oil to make sure none is being dumped because his well is about 400 ft. from the Excel Property. So far, there has been no problems with his water but it is a constant worry.

Carole Mann stated that Attorney Markey made a statement that no one complained until Mr. Costa came forward to renew licenses. Ms. Mann said that statement is untrue because she had Mr. Costa and his son visit her property to see how loud the noise is. Ms. Mann stated her horse is so stressed from the noise, he can't be ridden. Ms. Mann stated she did not mind the junkyard or the crusher that Thad's had but with Excel, my barn vibrates. As for the truck signs, one says, "Do Not Stop for Trucks", which does not make any sense. As a matter of fact, today is the first time Ms. Mann has seen any signs on the property and she has to pass by the property to get to her property. Ms. Mann stated she owns 27 acres and has been on the property for the past 12 years, in addition to growing up in Westport. Ms. Mann was very familiar with Thad's and Excel is a total different operation with the noise and the trucks. Ms. Mann stated that last week she could not get by the two large trucks to exit her road onto Charlotte White Road. Ms. Mann stated that Charlotte White Road is not a wide enough road for these constant trucks. Ms. Mann stated that she can't ride her horses during the week due to the noise and the operation takes place on Saturday mornings by 7:00 AM. Ms. Mann stated she bought the property back in 1997 and has had a barn for the past 12 years and a residence on the property for the last 10 years.

Bill Simonin stated he is not an abutter, but he is a Westport resident living on Plymouth Blvd. Mr. Simonin stated he shoes horses for a living. Approximately 3 weeks ago, he was at the Mann's barn shoeing her horses and he heard an explosion like he has never heard before. Mr. Simonin stated he was glad he was not down near the horse when that noise went off because there would have been some terrible consequence. When he asked Ms. Mann what that was, she stated it was Excel working. Mr. Simonin stated he left the property at approximately 11:30 AM and there were two tractor-trailers, with one of the trucks jack-knifed across the road. Mr. Simonin asked the driver to move so he could leave, but the driver just brushed him off and would not move. Mr. Simonin stated he would not want to live there. Mr. Simonin stated he has been a black smith for 20 years and he has been shoeing horses for Ms. Mann for the last 12 years. Mr. Simonin stated he is not part of this problem but he felt that he needed to come forward and let people know what he witnessed as an outside person. Mr. Moniz stated that Ms. Mann

approached him also with complaints but in speaking with her husband, he understood that property values were down everywhere.

Norman Methot stated he bought his property in 1984 and the noise now is pure and simple. Mr. Methot stated his well is close to the Excel property, about 200 – 300 ft. Mr. Methot's concern is over what is being spilled into the ground. The noise is horrible. Mr. Methot stated his wife suffers from Addison's Disease and can't even sit outside or in the house for that matter, to enjoy the peace and quiet they had. The loud noise is his principle concern. Mr. Methot stated he owns 2.2 acres.

Colleen Leonardo stated she moved into her home in June 2005. It was very quiet when she purchased the home but then all of a sudden the noise started. Ms. Leonardo stated it sounds like a bomb going off, even when you are in the shower with the ceiling fan running. Ms. Methot stated the noise is so loud, her husband and grandson were asleep on the recliner in her home when the bang went off and her husband nearly dropped her grandson out of surprise. Ms. Methot stated her foundation is starting to crack and she has had to put in a water system. There are fumes coming from Excel, which make you feel ill. On Saturdays, the noise starts at 7:15 AM and she has called the Police to make a complaint but is told that all they can do is log in the complaint. Ms. Methot stated that when she purchased her home it was only a year old and there were no cracks in the foundation. Now, besides the cracks, there is the fumes to deal with and some days, there is this low-lying cloud of fumes you can actually see; the smell is like burning plastic.

Sara Vieira stated she and her husband bought their property because it was surrounded by undeveloped land. Ms. Vieira stated she and her husband did business with Thad's when Mr. Moniz owned it. There was never a problem when Mr. Moniz owned it. Ms. Vieira stated that if this was the same type of business, she would be defending Excel, but it is not. This is a totally different business. As for the street signs, they just appeared this week; they were not there before. There is a huge amount of materials over what Thad's ever had. The trucks on the road are blocking traffic very often. Ms. Vieira stated she never complained when Thad's was there, he was there first and she has not complained when Excel took over, not even to the Police but this is not the same as Mr. Moniz's business and it is horrible.

Ed Vieira stated the signs first appeared on Monday but even with the signs, the trucks are still parked on the road with their flashers on. Mr. Vieira stated he went to take a picture of the trucks and was chased by the swearing truck drivers. Mr. Vieira stated he was paid by Mr. Moniz to install telephone poles to be used to put up a fence to hold the noise down. When Mr. Moniz was in business, there was a bulldozer, two loaders and a car crusher; he never had any of the equipment that is on the property today. Mr. Vieira stated that last year the DOT was parked on Route 88 and ironically, all the 18-wheelers dealing with Excel were detoured through Charlotte White Road and Sodom Road to avoid being inspected by the DOT on Route 88.

Wilma Woodruff stated she has lived in Westport all her life and for the last 41 years at her present residence. Ms. Woodruff stated she has lived through all the owners of the junkyard. Ms. Woodruff stated that she can't say it shakes her house or that there is odors or smoke clouds but she can say that he does start business early but she just figures it is a business and you will hear noise. Ms. Woodruff stated that people do need to make a living. As for the trucks, she has followed them and they turn right into the property. Ms. Woodruff has had her water tested and it is okay. On occasion, she does

hear loud noises but they don't bother her. Ms. Woodruff said her house was built in 1968 and is located in the middle of the Prices property and the corner of the road. Marty Costa, owner of Excel, stated he would like to clarify the complaint about oil water. Mr. Costa stated the Conservation Commission received a complaint about that and in response, his company had their water tested and the only thing found in the water was rust, which is all over Westport. The well at Excel is perfectly fine. Mr. Moniz stated there is a very high iron content in the Town and without a water system, over time, white clothes will turn orange if not treated.

After all the abutter's concerns were heard, Attorney Feingold spoke to the Board. Attorney Feingold stated that he lives in Westport on Horseneck Road. He represents the Prices' and the Fergusons' and is authorized to speak on behalf of those abutters who spoke here tonight and submitted affidavits. Attorney Feingold presented enlarged poster-sized photos of the property owned by Excel and the conditions that are existing. Attorney Feingold stated that the burden of proof is upon Excel to prove they are not more detrimental to the area than Thad's was. In comparing the photos of when Thad's owned the property to now with Excel owning the property. There are no signs of vehicles such as the junkyard that was owned by Mr. Moniz but instead, there is equipment, dumpsters and piles of metals. Attorney Feingold stated he moved to Westport in 2005; he grows vegetables for local markets such as Lees and totally enjoys the peace and serenity he has on his property, especially after a long day at work. Attorney Feingold stated he can't imagine that peace being taken away, so he can understand what these people here tonight are going through. Attorney Feingold stated he agrees with Attorney Markey, the Board needs to compare what Thad's was and what Excel is. Attorney Feingold stated there is definitely more of an expansion and it is definitely more detrimental. The crusher that was owned by Thad's was used about every two weeks or whatever schedule was kept but Excel is constant. The explosions are not scheduled, which makes it worse for the abutters. One important thought is that Thad's was located on a much larger area; with Excel, the area is compressed and near the abutters' homes. Included in the photos, Attorney Feingold noted the use of a sheerer, crane, old magnet crane and trailer trucks. Attorney Feingold stated that Charlotte White Road is only 24 ft wide; not suitable for trailer trucks. In the best of faith, even Excel can't impose rules on the truckers. As for the fumes, that only happens when there is a prevailing wind and as for the noise, not everyone hears it, especially when windows are closed. Attorney Feingold pointed out the barrier that was created for noise control; it is a barrier consisting of hugh stones pushed up into a berm with trailer bodies placed on top of the berm, there is another barrier of trailer truck bodies with tires, which is a haven for mosquitoes due to the standing water and then there is just a berm of trailer truck bodies. In using a bulldozer to create the berm, years of waste on the property was included in the berm. Now, under the Zoning Bylaw 8.0.1, a new junkyard being created is not allowed within 1,000 ft. of homes; current thinking, this should not be happening. There are piles of rubber, rubble and waste on the property. Attorney Feingold stated that red paint is a characteristic of lead paint; he noted on the photos that there is red metal on property. Attorney Feingold stated he understood that not every truck can be checked daily for everything that is being brought in but the problem does exist. There are dumpsters on the property, which is an indication of increased volume and noise. Attorney Feingold stated his clients and the abutters are relying on the Zoning Board of

Appeals for protection. There has been loss of home values, loss of peace and quiet with this new business opening and there is a potential for expansion. We are in an economic slump, when things change, the operation will only increase. There is 11 acres available for Excel to expand. Excel has already tried to lease out part of his property to three other companies. Excel is an expanding company with two other locations in Assonet and Charlton, MA. This company has gone from one plant to three in just four years. This site is a detriment, an eyesore and a safety hazard with the cranes operating from the tops of the piles. There is a constant threat to drinking wells, there is no use of the abutters' backyards and with a professional opinion obtained, there has been a devaluation of property. Attorney Feingold stated the Zoning Board of Appeals has a legal obligation to bring Excel to proper standards. In 2006, the Zoning Board of Appeals considered the application of Mr. Goes to place a billboard in a residential area, and was denied due to it being more detrimental to the neighborhood; that was nothing compared to what Excel is doing in this neighborhood; again, the Zoning Board of Appeals denied B&E Country Store on Sanford Road when they were applying for a beer & wine license, stating that it would be a detriment to the neighborhood. Attorney Feingold stated that he was asking on behalf of his clients, Excel's neighbors, to do the right thing and save these people's residences and lifestyles.

Mr. Moniz stated that the scrap is only going to increase when the dollar is weak; if the economy takes off, scrap will go down. Mr. Moniz stated that Mr. Costa bought the corporation, the licenses and the property.

*It was requested by Mr. Coutinho that Attorney Markey and Attorney Feingold label each photo submitted to the Board with an approximate date that the photo was taken due to the sensitivity of the material.

Attorney Markey stated the same things are being said tonight that were said one year ago. The substance from one year ago has not changed. All the information is the same, with nothing substantively different. The question remains the same also; is it substantially more detrimental. All the concerns are the same. As for the hours of operation, signage, berm and noise, my client has addressed all these items. Attorney Markey asked for consideration for his client.

Mr. Coutinho asked for a full-size site plan showing where each abutter was located in reference to the Excel property. As for the photos submitted by Mr. Moniz, they only show vehicles, not the scrap metal business he said he did. A photo showing a significant amount of scrap metal and white goods has not been presented.

Attorney Feingold referenced the decision of October 22, 2009 by the Superior Court Judge in that, the Board must determine if Excel is more of a detriment from Thad's operation. If the Zoning Board of Appeals were to make the decision without being able to impose conditions, then Excel would be substantially more detrimental; not questioning Mr. Costa's good faith but, the barriers are hideous, no one would accept living near them, the noise is still a problem and the trucks are still a problem.

Attorney Quirk stated the Board could close the hearing tonight or continue to another date and time certain in case there is any more evidence to be presented.

Mr. Coutinho asked if the Board would be looking at if there is a difference of operation from Thad's then and Excel now. Attorney Quirk stated the Board needed to look at what it is today. Attorney Quirk stated the Board found changes and imposed conditions but the law says the Board has no authority to impose conditions so the Board now needs

to determine whether without conditions being imposed, if the business's current use of the property is substantially more detrimental than what the use was of Thad's.

9:00 PM

Motion made by Mr. Coutinho for a ten-minute recess to allow the Attorney Markey and Attorney Feingold to get dates for the photos that were submitted by their clients. Second by Mr. Graham. The Board voted unanimously in favor.

Chairman Harrison called the meeting back to order at 9:11 PM with both Attorneys submitting photos and dates.

Chairman Harrison asked if there was any more testimony or evidence to be presented by either side. Seeing none, Mr. Harrison called for a motion.

Motion made by Mr. Coutinho to close the hearing at 9:27 PM. Second by Ms. Lambert. The Board voted unanimously in favor.

This hearing will be continued to October 6, 2010 at 6:00 PM for deliberations by the Board. No new evidence or testimony will be accepted from this point on.

Correspondence

1. Legal Update regarding Underwood Farms litigation – no action taken.
2. Fall Workshop Schedule – no action taken.

Consider

1. The next meeting date for a new application filed for 213 Main Road will be heard on Wednesday, October 27, 2010 at 7:45 PM.

Motion made by Mr. Coutinho to adjourn the Zoning Board of Appeals meeting at 9:50 PM. Second by Ms. Fernandes. The Board voted unanimously in favor.

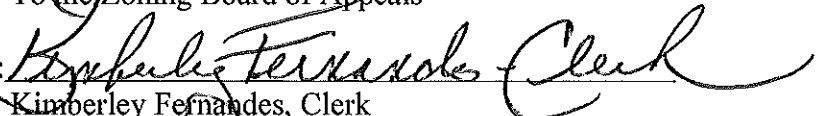
Adjournment.

Respectfully submitted,



Diane Pelland, Principal Clerk
To the Zoning Board of Appeals

APPROVED:


Kimberley Fernandes, Clerk